No. 16,179

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

DAN T. KENNEDY,
Appellee.

Appeal from the United States District Court for the District of Alaska, Third Division.

BRIEF FOR DAN T. KENNEDY, APPELLEE.

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I.

STATEMENT AS TO JURISDICTION AND AS TO PLEADINGS IN THE DISTRICT COURT.

Dan T. Kennedy, the appellee herein, accepts the statements made in its brief by the United States of America, the appellant, as to the jurisdiction of the District Court and as to the jurisdiction of this Court and concerning the pleadings and proceedings had in the District Court and the opinions of that Court.

II.

STATEMENT OF THE CASE.

This action is one in condemnation whereby the United States of America as plaintiff seeks to take certain real property, more particularly described in plaintiff's complaint and amended complaint, as a part of Mount McKinley National Park. The property sought to be taken is owned in fee simple by appellee Dan T. Kennedy. It consists of five acres and is situated adjacent to the McKinley Park Air Strip and close to McKinley Park Station on the Alaska Railroad. It is located East of the Alaska Railroad right-of-way and West of the Nenana River. (See Exhibit 3 attached to plaintiff's amended complaint, R 30.)[1]

III.

SUMMARY OF ARGUMENT.

This case is of considerable importance to appellee in that the United States of America is seeking to take his property which he does not desire to sell. In Kennedy's view of the matter, proper proceedings have not been had to authorize the taking of the property by the United States of America and he believes the proposed taking is without legal authority.

In addition to being of considerable importance to Mr. Kennedy, the appellee, this case is of much im-

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[1]The map, Exhibit 3, is not made a part of the printed record but the original is in the custody of the Court. Reference to it is found at R. 31.

portance to the executive officers of the United States of America in that if the power of taking here claimed were sustained, the power of executive officers to take private property for public use would be greatly extended beyond the limits heretofore set by the courts on such power. On the other hand, this case is of supreme importance to the people of the United States of America, far beyond the parties to this action, by reason of the fact that if the government's position here should be sustained, the power of executive officers of the United States of America to take private property for public use would be almost unlimited and beyond practical control by Congress as the legislative branch of the government.

The government here concedes, at least impliedly, that there is neither any general nor any specific statutory authority for the taking of private property for public use with reference to McKinley National Park. No contention is made by the United States in this action that it has Congressional authority to condemn the property here involved by reason of any necessary implication from specific authority given by Congress to the National Park Service.

The claim of the government in this case, as is disclosed by its brief, is that its legislative authority to procure the Kennedy land is the general appropriation act for the year 1951 wherein a lump sum amount was appropriated for use of the National Park Service for the acquisition of lands, interests therein, improvements and water rights. The claim of the government is that by virtue of the appropria-

tion act, the National Park Service was authorized, in its sole discretion, to acquire any private property that it wished to acquire, wherever such property might be located, so long as it was located in the boundaries of any national park or of any area administered by the National Park Service, and that it could acquire any and all of such property at any price that it saw fit to pay and without further authority from or interference by Congress. In other words, it is claimed that Congress gave the National Park Service a blank check for $275,000.00 which could be used in any way the National Park Service saw fit in acquiring private holdings in any of the national parks or in any of the areas administered by the National Park Service.

The power of eminent domain is a power inherent in the United States of America as a soverign government. This power is subject only to the limitations contained in the Fifth Amendment to the United States Constitution to the effect that private property may not be taken for public use except on payment of just compensation. Accordingly it is conceded that Mr. Kennedy's property at McKinley National Park, as well as all other property under the jurisdiction of the United States, may be taken under condemnation proceedings when the power to take has been properly given by Congress and whereby the condemnation proceedings are conducted with due process of law.

There is a distinct difference between the right of the United States of America to exercise its inherent power of eminent domain and the right of any par-

ticular official or agency or department of the United States of America to exercise that right on behalf of the United States of America. The general statute which authorizes officers of the United States of America to exercise the right of eminent domain on behalf of the United States of America is explicit to the effect that it is only in cases in which the officer is authorized to procure real estate for public use that he has any right or power to acquire such property by condemnation.

While the right of the United States of America to exercise the power of eminent domain is inherent, it has been repeatedly held, and stands without dispute, that the exercise of the right of eminent domain in the first instance is legislative. Executive officers may act to condemn property only where the authority to acquire property has been given those officers by specific authority or by necessary implication.

Statutes which undertake to authorize appropriation of private property for public use are strictly construed. The power of eminent domain should be exercised only where the plain letter of the law permits it and under a careful observance of the formalities prescribed for the owner's protection. Express legislative power is needed for these purposes and any act allegedly authorizing condemnation of private property for public use must be express and clear. If there are doubts as to the extent of the power given by the statute, after all reasonable intendments in its favor, the doubts should be resolved by a decision adverse to the claim of the power. The

fact that it may be convenient to the officials of the government to exercise the power is unimportant, and will not sustain the power. Unless power to procure the property is given by express authority of law, or by necessary implication from the power given, then the power to acquire property by eminent domain has not been given and an attempted exercise of condemnation proceedings to take the subject property cannot be sustained. The general statute relative to condemnation proceedings, 40 U.S.C., 257, by itself gives no authority to any officer to condemn private property for public use. This proposition was conceded by the government in the District Court and in spite of some general language to the contrary, is probably conceded by the government on this appeal.[2]

The government in this case relies solely upon Section VII of the general appropriation act for fiscal year 1951 as its authority for taking the Kennedy property. In particular it relies on that portion of the act which reads:

> ". . . and the acquisition of lands, interests therein, improvements and water rights, . . ., $19,667,000.00 . . ."

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[2]On page 15 of its brief the government uses the following language: "But the fact that the Department of the Interior has alternative authorities in some cases does not negate the existence of 40 U.S.C. sec. 257 nor destroy its validity where the Department must rely on that authority alone." In view of the wording of the statute where it is said: "In every case where the Secretary of the Treasury or any other officer of the government *has been*, or hereafter shall be, authorized to procure real estate, etc. . . ." and in view of the law on this subject, we do not believe the government is serious in its statement that this statute authorizes any procurement of property "where the Department must rely on this authority alone".

A goodly portion of appellant's brief is taken up with cases cited to the proposition that the government's power to condemn is coextensive with its power to purchase. (See brief, page 11.) That matter is not in dispute. Appellee concedes that the cases generally hold that the power of the United States of America to condemn property is coextensive with its power to purchase the property. Our quarrel with the government here is that we dispute the claim of the government that the National Park Service, through the Secretary of the Interior, ever had, or now has, any right to acquire the Kennedy property at Mount McKinley National Park, Alaska, either by condemnation or by purchase.

Appellant in its brief argues that the legislative history of the general appropriation act for the United States for fiscal year 1951 shows that Congress gave power to the National Park Service in its discretion to purchase any lands in private ownership which it might desire so long as such lands were located in the boundaries of any national park or without the boundaries of any area under the jurisdiction of the National Park Service. Accordingly, it is argued that it had the right to purchase the Kennedy property, or if it so chose to, to condemn it.

The legislative history of the general appropriation act for fiscal year 1951 will not support the government's contention. A reading of the legislative history demonstrates conclusively that the National Park Service considered it already had authority to acquire all the land it desired to acquire and that the requested

appropriation was merely a request for funds to purchase the lands desired. Those lands desired by the Service were specifically listed in the request for the appropriation. They did not include the Kennedy land or any land relative to Mount McKinley National Park.

Since the National Park Service has been given no general or special authority to acquire lands at McKinley National Park, and no authority to so acquire property at that place has been claimed or is shown to have been given by necessary implication from powers given to or required of the National Park Service, it follows that the National Park Service has no power to acquire the Kennedy property at all, either by purchase or condemnation. Thus it is clear that plaintiff's amended complaint stated no claim in favor of the government and against the property or against the appellee, Dan T. Kennedy, and that the order of the District Court in dismissing the action was entirely proper and should be affirmed by this Court.

IV.

ARGUMENT.

Appellee in this proceeding has conceded and now concedes the following propositions of law:

A. The United States of America as a sovereign government has the inherent power to exercise the right of eminent domain as to any property under the jurisdiction of the United States of America, includ-

ing the property belonging to appellee, Dan T. Kennedy, and situated at McKinley Park Station, Alaska, subject to the constitutional limitations contained in the Fifth Amendment to the Constitution of the United States of America as to taking of private property for public use without just compensation.

B. The right of the United States of America to condemn property under eminent domain proceedings, where authority has been given by Congress to acquire the land, is exercised under the provisions of what is now 40 U.S.C. § 257, and in procedural matters is governed by Rule 71(a) of the Federal Rules of Civil Procedure.

C. Title 40 U.S.C., § 257, by itself does not authorize the acquiring of property by an executive official, agency or department. Congressional sanction is required to authorize the acquiring of property by eminent domain. This required Congressional sanction may be given by general acts authorizing a particular executive officer to acquire property or by special acts giving the same authority under special circumstances. The Congressional authority to acquire property, and thus to condemn property, may be given by necessary implication from authority given or duties required by Congress of the particular department or agency or officer involved. Such authority may also be evidenced by appropriations made by Congress. Cases illustrative of the power to acquire, and therefore to condemn, under necessary implication from authority given or duties required, include cases such as *United States v. Threlkeld,* 72 Fed. (2d) 464, and *Polson Logging*

Co. v. United States, 160 Fed. (2d) 712, cited and discussed in appellant's brief. Cases illustrative of the proposition that an appropriation act may be used as evidence of Congressional authority given to acquire property, and therefore to condemn private property, include the *Threlkeld* and *Polson* cases above cited, and other cases cited by appellant in its brief, such as the case of *Seneca Nation of Indians v. Brucker,* 162 Fed. Supp. 580, and *United States v. 5,677.94 acres of land,* 152 Fed. Supp. 861. Appellee has no quarrel with these cases or with the propositions of law therein set forth. The opinions in those cases were perfectly proper under the facts of the particular cases.

D. The cases generally hold that the power of the United States of America to condemn private property for public use is coextensive with its power to purchase the property. (See cases cited by the United States government as appellant on page 11 of its brief with reference to this proposition.)

E. The question of "just compensation" is not at issue in this matter at this time. The above entitled action was dismissed by the District Court on the ground that plaintiff's amended complaint, as a matter of law, did not state a claim in favor of the plaintiff, United States of America, and against the land in question, or, against appellee Kennedy, upon which any relief might be granted by the Court. No answer has been made to plaintiff's amended complaint. If this Court should affirm the action of the District Court, then the matter of "just compensation" will not arise. On the other hand, if it should finally be

determined that the District Court erred in dismissing the action as against the Kennedy property, then appellee Kennedy, as defendant, will be required to answer plaintiff's amended complaint and to defend the action. The issue of "just compensation" will then be tried.

Having made concessions as hereinabove set forth, it is the purpose of appellee in this brief to demonstrate that the United States of America as plaintiff, in its amended complaint, stated no claim against the Kennedy property, or against Kennedy, upon which any relief could be granted by the Court and accordingly that the action of the District Court in dismissing the action as to such property and as to the defendant, Dan T. Kennedy, was right and proper and should be affirmed by this Court.

We have previously said that the power of the United States of America to exercise the right of eminent domain is inherent and subject only to the limitations set by the Constitution of the United States. Having made this concession, it does not follow that a particular officer of the United States or a particular department or agency of the United States has any right or authority whatsoever to exercise the right of condemnation on behalf of the United States of America in a particular case. (*United States v. 458.95 acres of land, etc.,* 22 Fed. Supp. 1017.)

The United States of America recognizes the right of its citizens to own and to hold property without interference from the United States of America except

where Congress has authorized the taking of that property. Where the authority to take is given that authority is paramount, subject of course to taking by "due process of law". The Congress of the United States as the legislative branch of the United States government must in the first instance grant the authority to the particular department or agency or officer of the United States of America before that officer or agency or department may exercise the right of eminent domain on behalf of the United States of America.

May we here quote from the case of *United States v. Rauers,* 70 Fed. 748, where the following language appears:

> "A fundamental principle of law controlling all matters of this character is that every statute which undertakes to appropriate in any manner the property of private persons for public use, must be strictly construed. One of the great aims of government is to secure to each citizen the enjoyment of his estate. On the other hand, in cases of public necessity, the right of the individual must yield to the right and demand of the public; but, since that demand is in derogation of private right, it must be closely scrutinized, and the expression of legislative purpose in which it is conveyed, must be strictly construed.
>
> > 'So high a prerogative as that of divesting one's estate against his will should only be exercised where the plain letter of the law permits it, and under a careful observance of the formalities prescribed for the owner's protection.' Cooley, Const. Lim. p. 651.

"The same eminent authority also declares:

'Express legislative power, moreover, is needed for these purposes. It will not follow that, because such things are convenient to the accomplishment of the general object, the public may appropriate them without express authority of law; but the power to appropriate must be expressly conferred.' Id. p. 666.

"It is elsewhere stated that:

'The act authorizing condemnation must be express and clear. If there are doubts as to the extent of the power, after all reasonable intendments in its favor, the doubts should be resolved by a decision adverse to the claim of power.' Mills, Em. Dom. § 48.

"The supreme court of Massachusetts sustains this proposition:

'It must appear that the government intended to exercise this high sovereign right by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting such intent. It must also appear by the act that they recognized the right of private property, and mean to respect it; and, under our constitution, the act conveying the power must be accompanied by just and constitutional provisions, for full compensation to be made to the owner.' Boston, etc., R. Corp. v. Salem, etc., R. Co., 2 Gray, 36."

and again at page 751, the following language is used:

"It is rarely the case where eminent text writers, the courts and the legislature itself coincide so strongly in the recognition of a legal principle,

> that principle being that there must be express authority in the secretary of the treasury, when charged with such matters, to procure land for public use, before he is authorized, in his discretion, to proceed by condemnation for that purpose."

See also *United States v. A Certain Tract of Land in Cumberland Tp.,* 70 Fed. 942, where the following language appears:

> "The power of the government of the United States to take private property for public use, upon making just compensation, is unquestionable; and, for the present purpose, I assume, without deciding, that the use alleged to be contemplated in this instance is a public use, and that the taking proposed would be compensated. The power referred to is, however, not exercisable at all in the absence of legislative authorization."

In *United States v. Fiske Building et al.,* 99 Fed. Supp. 592, 594, it is said:

> "However, the power to condemn may be exercised only when explicitly authorized by statute . . ., unless such authority exists the petition must be dismissed."

In *United States v. Threlkeld,* 72 Fed. (2d) 464, 466, cited and quoted by the appellant in its brief, it is said at page 466:

> "Appellee contends that the power of eminent domain should be confined to the express terms or clear implication of the grant, and the cases of United States v. Rauers (D.C.) 70 F. 748, and United States v. A Certain Tract of Land in Cumberland Tp. (C.C.) 70 F. 940, are relied

upon to sustain its application. We recognize that doctrine and are in accord with it, but for the reasons stated we think the power is clearly conferred here."

In *Youngstown Sheet & Tube Company v. Sawyer,* 103 Fed. Supp. 569 (affirmed 197 Fed. (2d) 582, 343 U.S. 579) at page 574 it is said:

"The grants of executive power are necessarily in general terms in order not to embarrass the executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist."

and again at page 575, it is said:

"Defendant also contends that the Executive has an inherent power in the nature of eminent domain, which justifies his action. The power of eminent domain is a Congressional power. As stated by the Supreme Court in Hooe v. United States, 281 U.S. 322, 323, 336, 31 S. Ct. 85, 89, 54 L. Ed. 1055, 'The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the government.' The President therefore does not have the power of eminent domain, and the cases defendant cites do not disclose that he has anything in the nature of such power. . . ."

In *United States v. West Virginia Power Company,* 33 Fed. Supp. 756, 759, it is said:

"The power of eminent domain is arbitrary in character and subversive of the right of private

property and before it can be exercised by any officer of the Government, its delegation to him must plainly appear and may not be deduced from any ambiguous language or by doubtful inference. Laws authorizing public officers to exercise the sovereign power of eminent domain are strictly construed. United States v. A Certain Tract of Land, C.C., 70 F. 940; Delaware, L. & W. R.R. v. Morristown, 276 U.S. 182, at page 192, 48 S. Ct. 276, 72 L. Ed. 523, and authorities cited therein. So it must first clearly appear from the petition that the federal officers are authorized to institute this proceeding and upon what that authority is based. Dept. Public Works v. Lewis, 344 Ill. 253, 176 N. E. 345."

See also:

United States v. 8557.16 acres of land in Pendleton County, West Virginia, 11 Fed. Supp. 311;

Wayne County Court, West Virginia v. Louisa and Fort Gay Bridge Company, 46 Fed. Supp. 1;

Carmack v. United States, 135 Fed. (2d) 196.[3]

We have found no general statute which authorizes the Secretary of the Interior, on behalf of the Na-

[3]The *Carmack* case was remanded to the District Court for retrial and on re-trial the District Court held that the attempted taking was an arbitrary and unnecessary act and the court of appeals affirmed on the ground that the Federal Works Administrator and the Postmaster General lacked authority to take the particular land sought to be condemned. The Supreme Court of the United States in 329 U.S. at 230, held that the executive officers in question had been given the requisite authority by Congress under general acts.

tional Park Service, to condemn private property for public use. No such statute has been cited in these proceedings. There is a general statute which authorizes the Secretary of the Interior to secure private property on behalf of the National Park Service for the specific purpose of acquiring rights of way for constructing, improving and maintaining roads within the authorized boundaries of any area of the national park system and miscellaneous areas. See 16 U.S.C. § 1b(7), act of August 8, 1953, 67 Stat. 495. There are also statutes giving the Secretary of the Interior, on behalf of the National Park Service, the right to acquire private property within various of the national parks. The District Court in its opinion (R 42) and in its supplementary opinion (R 58), has cited some of these particular statutes. See Section 157a of Title 16, U.S.C.A., Big Bend National Park, which is illustrative of one version of these statutes. It reads:

> "The secretary of the interior is authorized to acquire, in such manner as he shall consider to be in the public interest, any land, or interest in land situated within Sections 15 . . . etc."

Title 16, Section 404c is illustrative of another version of these special statutes with reference to particular parks wherein it is provided:

> "The secretary of the interior is hereby authorized in his discretion to acquire for inclusion within the Mammoth Cave National Park by purchase, condemnation, or otherwise, any lands, interest in lands, and other property within the

> maximum boundaries thereof as authorized by Sections . . ."

There is no special statute authorizing acquiring of property either by purchase or by condemnation with reference to Mount McKinley National Park.

The United States seeks to justify its attempt to acquire the Kennedy property herein concerned by the provisions of the general appropriation act for the year 1951, the act of September 6, 1950, 64 Stat. 595, 679, Chapter VII, wherein certain moneys are appropriated for the use of the National Park Service in the following language:

> "For construction and improvements . . .; and the acquisition of lands, interests therein, improvements and water rights; to remain available until expended, $19,667,000.00 . . ."

Appellant relies heavily on the case of *Polson Logging Co. v. United States,* 160 Fed. (2d) 712, decided by this Court and upon the case of *United States v. Threlkeld,* 72 Fed. (2d) 464, which is followed by the *Polson* case. As we have previously said, we have no quarrel with those cases. On the facts and under the statutes there involved those cases are sound. However, and as we have pointed out, there is no question in this case of authority implied from authority given. The appropriation act concerned in the *Threlkeld* case specifically appropriated money for the construction of roads and trails and the Court held that that appropriation, together with the general duty of the Secretary of Agriculture to protect and manage the na-

tional forests, gave the secretary implied power to acquire ground necessary to construct the required roads. The *Polson* case involved the same duties of the secretary to protect and manage the forests, together with his duties under the Federal Highway Act. The appropriation act made money available to the secretary to carry out the provisions of the Federal Highway Act. The Court found that the term "construction" included "costs of rights of way". This case, like the *Threlkeld* case, held that the requisite authority to acquire land must be implied from the authority given and duties required. Both of these cases are clearly distinguishable from the case now being considered and neither stands as any authority for the government's position here.

The government in its brief analyzes at some length the legislative history of the general appropriation act for fiscal year 1951, citation as above. From that legislative history the government claims that the Congress of the United States appropriated the sum of $275,000.00 for the purpose of eliminating private holdings in the national parks and in areas under the jurisdiction of the National Park Service and that such sum was a discretionary fund which could be used by the Director of the National Park Service in purchasing or in condemning property which might be selected anywhere within the National Park system by the secretary.

We submit that a fair reading of the Congressional proceedings with reference to this appropriation act will not justify the conclusion of the United States

as to the alleged discretionary authority. Furthermore, we believe that upon application of the law, as hereinabove cited, that the general appropriation act for 1951 does not authorize the taking of Mr. Kennedy's land for Mount McKinley National Park, Alaska. The alleged authority of the United States of America to take the property is to be strictly construed. The power to appropriate Mr. Kennedy's property has not been expressly conferred and does not arise by necessary intendment or implication from the provisions of the subject appropriation act. All doubts as to the extent of the power to acquire, and thus to condemn, after all reasonable intendments in its favor, should be resolved in favor of the owner of the property and against the claimed power to acquire by condemnation. Congress having given authority to the Secretary of the Interior to acquire property, and if necessary to condemn property, in certain specific instances, has denied the power to the secretary to acquire property by condemnation except where the authority is specifically given.

Turning to the history of the legislative act, we find that the National Park Service for fiscal year 1951 requested a total of $275,000.00 for the purpose of acquiring private properties within the various national parks and monuments. The requested appropriation, together with other requests, was deleted by the House of Representatives from the appropriation. The Senate restored the requested sum for this purpose. On conference between the House and Senate committees the Senate version of the act was adopted.

(See conference report, page 41, amendments 298 and 299.) The Senate version was contained in the bill as adopted.

The officials of the National Park Service, including Mr. Drury, the Director; Mr. Tolson, the Assistant Director; Mr. Demaray, the Associate Director, and Mr. Beasley, the acting Director of the Budget, all testified relative to this requested appropriation. Written exhibits and justifications as well as oral testimony were presented. A reading of the testimony will disclose that Mr. Drury and Mr. Tolson believed this appropriation to be of the utmost benefit to the National Park Service and that Mr. Drury, at least, considered it a flexible fund to be used in various areas under his jurisdiction. See for example his testimony at pages 225, 226, and 227 of the Senate hearings. However, the hearings show that the requested appropriation was to be used in certain designated areas. At the request of Senator Cordon, a table was furnished designating the areas and the approximate acreage and the estimated price of the land desired. (Senate hearings, 230.) No land with reference to Mount McKinley National Park, was included and the anticipated cost of lands which were included was $300,000.00, $25,000.0 above the requested appropriation for this purpose.

The hearings with reference to the 1951 request by the National Park Service for funds for land acquisition show that this requested appropriation was to be used to acquire lands where the owner was willing to sell and where the government could get a bargain

by buying the land. See for example, page 230 of the Senate hearings where Senator Hayden in questioning Mr. Drury used an example with reference to land at Grand Canyon where an owner had had an exalted idea of the value of his land but later decided he could take a reasonable sum and the land was later acquired that way. The Senator said: "It depends on whether you make a reasonable deal with the owner." Mr. Drury replied: "Yes, we can give an approximate schedule of what we intend to do," and cites as an example lands in Glacier Park as included in the schedule of properties to be acquired with the requested appropriation. See also testimony of Mr. Drury before the House committee (Hearings, House of Representatives, 357) "That work has picked up, and we have lots of them that we are handling where we are getting bargains. We are not going to buy expensive land. That is the policy." The National Park Service has never consulted Mr. Kennedy concerning purchase of his ground. So far as he knows it has never had his ground appraised or set a proposed purchase price for it.

In any case it is clear that the National Park Service in requesting the $275,000.00 appropriation for land acquisition was not asking for any additional authority to acquire lands. The Service was merely attempting to secure necessary funds to buy lands for which it already had purchase authority. In the House hearings, Mr. Beasley at pages 1649 and 1650 of the hearings report, with reference to the requested item for land acquisition, used the following language:

"This item consolidates all the appropriations contained in the 1950 appropriations act for construction and land acquisition activities of the National Park Service . . . The language proposed for this item does not in any way broaden the authority heretofore carried in the appropriation items for this purpose."

Mr. Norrell asked a question of Mr. Beasley as follows:

"It simply constitutes a consolidation of those items and gives you no additional power?"

Mr. Beasley replied: "Yes, sir."

In the Senate hearings, Senator McCarran asked a question of Mr. Drury as follows (Senate Hearings 230):

"Have you not a statute under which you can acquire land within the national parks?

Mr. Drury replied: "Yes, the act of 1916."

Senator McCarran asked:

"And does not that include provisions for the acquisition of land for national parks?"

Mr. Drury replied: "It gives us the authority, yes, Senator; *but we still, of course, have to get the appropriations.*"

Senator McCarran asked:

"And you have to get the authority from the Congress to create the park, do you not?"

Mr. Drury answered: "Yes, when the park is created, the act creating it, generally, I think universally, gives us the authority to acquire the land within its boundaries."

Nowhere in the Congressional proceedings is it suggested that the fund of $275,000.00 for acquisition of lands is to be used as a discretionary fund giving the National Park Service authority to purchase property in areas under its jurisdiction wherever it might deem it desirable or that the fund was to be used anywhere except in areas listed in the budget request or in areas where the National Park Service, through the Secretary of the Interior, already had authority to acquire private property under specific statutes applying to various of the parks. The claim that the appropriation act gave additional authority to acquire lands which were not listed in the request came as an afterthought.

The appropriation statute cited by the government as its authority for procuring the Kennedy land, giving that appropriation act every reasonable intendment, cannot be said to express any clear and definite intention of Congress to give authority to the National Park Service to acquire the Kennedy property.

We desire to point out that Congress in at least two instances since the adoption of the 1951 appropriation act, has adopted specific legislation whereby the Secretary of the Interior has been authorized to acquire private property within the areas under the jurisdiction of the National Park Service. One of these statutes is a general statute adopted in 1953, subsection 7 of section 1b of Title 16 U.S.C.A., whereby Congress gave the Secretary general authority to acquire rights of way within the national park areas for the purpose of constructing, improving and maintaining

roads. The other is Public Law 85-358, 85th Congress, adopted March 28, 1958, cited by Judge Hodge in his opinion, where Congress gives the Secretary of the Interior the right to acquire any non Federal land or interests in lands within the area authorized and set aside as the Petrified Forest National Park, in the State of Arizona. These statutes would have been completely unnecessary if the Secretary had the authority claimed for him by the government. The appropriation act does not give or evidence the giving of the power to take the Kennedy land.

The act which originally created Mount McKinley National Park, now Sec. 347 of Title 16 U.S.C.A., was amended in 1932 by what is now Sec. 355 of Title 16 U.S.C.A. which changed the boundaries of the Park. This amendment established the west boundary of the Alaska Railroad as the eastern boundary of the park but added the following proviso:

> "Provided, however, that such isolated tracts of land lying east of the Alaska Railroad right of way and the west bank of the Nenana River between the north bank of Windy Creek and the north park boundary as extended eastward are also included in said park; . . ."

The Kennedy land is between the Alaska Railroad right of way and the Nenana River. We can only guess as to what was intended when Congress used the words: "such isolated tracts of land, . . .". If it was meant to include all the land in the area described, Congress would have no doubt said so. If it was meant to include "isolated tracts" in private owner-

ship, including the Kennedy land, we believe that appropriate language would have been used to express that idea. It seems more likely that Congress intended to include in the Park only those "isolated tracts" of land situated in the area between the river and the railroad which were still a part of the public domain.

The National Park Service for many years has taken the position that the Kennedy property is in Mount McKinley National Park. The map attached to plaintiff's amended complaint shows it as being in the Park. Appellant throughout these proceedings assumes that the Kennedy property is within Mount McKinley National Park boundaries.

In any case the original act creating Mount McKinley National Park, as well as the act which amended the boundaries of that park, specifically protected vested private rights within the respective areas and provided that "any such claimant, locator or entryman" should not be affected by the creation of or by the enlargement of the park and should have the full use and enjoyment of his land. (See Sec. 348 of Title 16, U.S.C.A., as to the original act and the second proviso at the end of Sec. 355, Title 16, U.S.C.A., with reference to the same matter on the extension of the park boundaries.)

Appellee in the District Court raised the question as to whether his property was or was not within the boundaries of Mount McKinley Park. The Court refused to decide that question as being unnecessary to the decision which was made.

If the Kennedy property is not within the boundaries of Mount McKinley Park, that fact alone defeats

this action. Even under the contention of the government the appropriation of $275,000.00 was to be used only to acquire property in areas under National Park Service jurisdiction.

However, the District Court did hold that in view of the reservations made by statute concerning vested rights that if Congress had intended to authorize the Secretary of the Interior to take private property with reference to Mount McKinley National Park that it would have done so by specific statute, as it did do with reference to other parks and areas. The reasoning of the trial court is sound.

The same reasoning applies to the contention that the 1951 appropriation act authorized the National Park Service to acquire the Kennedy ground. Since that act said nothing about the Kennedy ground or about any land at Mount McKinley National Park, and since the legislative history of the appropriation act is silent as to the Kennedy land and as to any land with reference to Mount McKinley National Park, the appropriation act may not be used as authority to condemn the Kennedy ground in which Mr. Kennedy has a vested right by fee simple ownership acquired before the boundaries of the park were extended.

In conclusion may we state as follows: The government here has cited no general or special act authorizing the condemnation of any land with reference to Mount McKinley National Park. The claimed right to condemn under authority of the 1951 appropriation act is not valid authority for taking the Kennedy property at Mount McKinley, Alaska. Neither the

appropriation act nor its legislative history indicates any intention by Congress to authorize the purchase or condemnation of the Kennedy land. The fact, if it is a fact, that money is available to purchase the Kennedy property, as set forth in the letter of the Interior Department's Solicitor to the Attorney General (R. 35) avails appellant nothing. The appropriation act does not plainly and clearly give to the Secretary any power to acquire the Kennedy property. As is said in *United States v. West Virginia Power Co.,* 33 Fed. Supp. 756, 759, above cited, authority will not be deduced "from any ambiguous language or by doubtful inference." Construing the statute against the claimed power to take, as we must, and in the light of express statute protecting Kennedy's vested rights in the property, the government has no right at this time to take the Kennedy property and plaintiff's amended complaint states no claim for relief. The District Court did not err in dismissing the action and its judgment should be sustained.

If the National Park Service wants the Kennedy land, and can justify its acquisition, it can and must go to Congress for that authority. If the authority to purchase is given by Congress, Kennedy will have no complaint as to the taking of his land and the land may be acquired under due process of law.

Dated, Anchorage, Alaska,
September 21, 1959.

Respectfully submitted,
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